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No. 83-240

In the Supreme Court of the United States

OCTOBER TERM, 1983

LAWRENCE COUNTY, ET AL., APPELLANTS

v.

LEAD-DEADWOOD SCHOOL DISTRICT NO. 40-1

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether South Dakota Codified Laws § 5-11-6 (rev. 1980) is inconsistent with the Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*, and therefore invalid under the Supremacy Clause to the extent it requires that funds received by local government units under the federal statute be apportioned in the same manner as taxes are distributed.

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is submitted in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. The Payments in Lieu of Taxes Act, 31 U.S.C. 6901 *et seq.*,[1] requires the Secretary of the Interior to make annual payments to local governments within whose boundaries the United States owns tax-exempt federal "entitlement

[1]Title 31 of the United States Code was recodified in 1982 by Pub. L. No. 97-258, 96 Stat. 877 *et seq.* The recodification did not make any substantive change in the law. See H.R. Rep. 97-651, 97th Cong., 2d Sess. 3 (1982). In future editions of the Code, the Payments in Lieu of Taxes Act will appear at 31 U.S.C. 6901 *et seq.*, instead of 31 U.S.C. 1601 *et seq.* In this brief, we refer to the recodified version.

lands."[2] The purpose of the Act is to compensate local governments for the loss of tax revenues resulting from the tax immunity of such federal lands. See pages 3-4, 9-10, *infra*. The lands to which the Act applies include wilderness areas and other lands within the National Park System and National Forest System, lands administered by the Bureau of Land Management, lands used by the Army Corps of Engineers for water resource development projects and dredge disposal areas, and lands on which semi-active and inactive military installations are located. See 31 U.S.C. 6901. Those lands total over 450 million acres. Payments under the Act amount to almost $100 million annually and are made to approximately 1,700 counties, located in 49 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Guam. See U.S. Dep't of the Interior, Bureau of Land Management, *Payments in Lieu of Taxes, Fiscal Year 1983*, at 1.

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[2]31 U.S.C. 6902(a) provides:

> The Secretary of the Interior shall make a payment for each fiscal year to each unit of general local government in which entitlement land is located. A unit may use the payment for any governmental purpose.

31 U.S.C. 6901 provides in pertinent part:

* * * * *

> (2) "unit of general local government" means —
>
> (A) a county, city, township, borough existing in Alaska on October 20, 1976, or other political subdivision of a State that the Secretary of the Interior, on the same basis that the Secretary of Commerce uses for general statistical purposes, decides is a general purpose political subdivision of a State;

* * * * *

The Payments in Lieu of Taxes Act was the product of long and careful consideration at the federal level.[3] Over the years Congress has enacted a number of different impact aid programs designed to compensate states and localities for loss of tax revenues resulting from the tax immunity of federal lands.[4] But the revenues that fund those impact aid programs generally are derived from income-producing activities on federal lands, such as oil and gas leasing, mining, and grazing, and the payments are therefore likely to vary from year to year. Moreover, in a number of instances, funds paid under the impact aid programs are earmarked by statute for particular purposes, such as the building of public roads or the support of public schools. See S. Rep. 94-1262, 94th Cong., 2d Sess. 7 (1976). These circumstances, among many others, led to the establishment, in 1964, of the Public Land Law Review Commission, to which Congress assigned the task of reviewing the full range of laws applicable to federal lands and recommending any needed revisions.[5]

In its 1970 final report, the Commission concluded that "it is the obligation of the United States to make certain that the burden of [the policy of retaining lands under federal

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[3]The problem of the effect on state and local governments of the tax immunity of federal lands within their boundaries has existed for many years. In 1806, the Attorney General issued the first legal opinion regarding nontaxability of federal lands by state governments. 1 Op. Att'y Gen. 157 (quoted in *Van Brocklin* v. *Tennessee*, 117 U.S. 151, 163 (1886)). This Court's opinions in *Van Brocklin* and in *Wisconsin Central R.R.* v. *Price County*, 133 U.S. 496 (1890), established the "inflexible rule, with no exceptions, that property of the Federal Government may not, absent the express consent of the Government, be taxed by a State or subdivision thereof." *Jurisdiction Over Federal Areas Within the States: Report of the Interdepartmental Committee for the Study of Jurisdiction Over Federal Areas Within the States, Pt. II*, 267 (1957).

[4]31 U.S.C. 6903(a)(1) contains a partial listing of these programs.

[5]Pub. L. No. 88-606, 78 Stat. 982.

ownership] is spread among all the people of the United States and is not borne only by those states and governments in whose area the lands are located. Therefore, the Federal Government should make payments to compensate state and local governments for the tax immunity of Federal lands." *One Third of the Nation's Land: A Report to the President and to the Congress* 236 (1970). The Commission recommended replacement of the numerous revenue-sharing statutes then on the books with a single payment in lieu of taxes. However, Congress concluded that it was not feasible at that time to repeal the existing statutes. S. Rep. 94-1262, *supra*, at 1 *i*. Instead, in 1976 Congress passed the Payments in Lieu of Taxes Act, which provides for a minimum level of payments to local government units to compensate partially for lost revenues not covered by payments received under other statutes.

2. In 1979, the State of South Dakota enacted a statute requiring local governments to distribute federal payments in lieu of taxes in the same way as general tax revenues are distributed. S. D. Codified Laws § 5-11-6 (rev. 1980) provides:

> The county auditor shall distribute federal and state payments in lieu of tax proceeds in the same manner as taxes are distributed.

Since appellant Lawrence County allocates to its school districts approximately 60% of general tax revenues, the South Dakota statute effectively requires it also to apportion to the school districts 60% of the federal in lieu of taxes payments it receives.

3. Lawrence County originally brought an action in the United States District Court for the District of South Dakota seeking a declaration that the state statute is in conflict with the Payments in Lieu of Taxes Act and is

therefore void under the Supremacy Clause of the United States Constitution (Art. VI, Cl. 2). The district court held that the federal statute vests total discretion in the counties with respect to distribution of federal in lieu of taxes payments and that the states may not dictate the manner of distribution. The court therefore declared the South Dakota statute void insofar as it affected distribution of funds received under the Payments in Lieu of Taxes Act and granted summary judgment for Lawrence County. *Lawrence County* v. *South Dakota*, 513 F. Supp. 1040 (D.S.D. 1981). The United States Court of Appeals for the Eighth Circuit vacated the district court judgment on the ground that the County's invocation of the Supremacy Clause did not convert the action into one arising under federal law for the purpose of federal jurisdiction under 28 U.S.C. 1331. *Lawrence County* v. *South Dakota*, 668 F.2d 27 (8th Cir. 1982).

4. Lead-Deadwood School District No. 40-1, appellee in this Court, then filed a complaint for writ of mandamus in the Circuit Court for the Eighth Judicial Circuit of South Dakota, seeking to compel Lawrence County to distribute federal in lieu of taxes funds according to S.D. Codified Laws § 5-11-6. The trial court declined to issue the writ, citing the Payments in Lieu of Taxes Act (J.S. App. 8a-10a). The court held that the South Dakota statute stood as an "obstacle to the accomplishment and the execution of the full purposes and objectives of Congress and as such is unconstitutional and void under the supremacy clause of the federal and state constitutions" (J.S. App. 10a).

The Supreme Court of South Dakota reversed (J.S. App. 1a-7a). Because the State Supreme Court found the language of the federal statute to be "plain, clear and rational" (*id.* at 3a), it concluded that review of the legislative history was unnecessary. The court found no conflict between the state and federal statutes, reasoning that the federal statute

required only that payments be used for a governmental purpose and that support of schools is a valid governmental purpose (*id.* at 4a). Two justices dissented on the ground that the statute as a whole, along with its legislative history, indicated that "Congress intended [that] the county be vested with total discretion in distributing [federal in lieu of taxes] funds" (*id.* at 6a).

DISCUSSION

This Court has frequently reiterated that a state statute is void if it "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress." *Silkwood* v. *Kerr-McGee Corp.*, No. 81-2159 (Jan. 11, 1984), slip op. 9; *Pacific Gas & Electric Co.* v. *State Energy Resources Conservation & Development Comm'n*, No. 81-1945 (Apr. 20, 1983), slip op. 11; *Fidelity Federal Savings & Loan Ass'n* v. *de la Cuesta*, 458 U.S. 141, 153 (1982); *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 158 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 142-143 (1963); *Hines* v. *Davidowitz*, 312 U.S. 52, 67 (1941). Accordingly, to determine whether state and federal laws are in conflict it is necessary first to "ascertain Congress' intent in enacting the federal statute at issue." *Shaw* v. *Delta Air Lines, Inc.*, No. 81-1578 (June 24, 1983), slip op. 9. See also *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Perez* v. *Campbell*, 402 U.S. 637, 644 (1971).

Here the federal statute, the Payments in Lieu of Taxes Act, is properly read as conferring discretion on local governments to allocate the payments they receive under the Act. S.D. Codified Laws § 5-11-6, which requires local governments to apportion those payments in a particular manner, therefore conflicts directly with the mandate of the federal statute and interferes with the accomplishment of Congress's goals. The state statute is invalid under the

Supremacy Clause to the extent it mandates allocation of the federal payments.

If permitted to stand, the decision of the South Dakota Supreme Court will frustrate one of the congressional objectives underlying the Payments in Lieu of Taxes Act. In addition, the decision may encourage other states to follow South Dakota's example, leading to further interference with operation of the federal program. Therefore, we join appellants in urging the Court to note probable jurisdiction and to reverse the judgment of the South Dakota Supreme Court.[6]

1. a. The natural reading of the Payments in Lieu of Taxes Act is that local governments receiving funds under the Act have complete discretion in expending or allocating those funds. 31 U.S.C. 6902(a) expressly states that units of local government "may use" payments under the Act "for any governmental purpose." The import of this broad language is that recipients of federal payments may choose

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[6]In the earlier litigation in which Lawrence County challenged the South Dakota statute, the Eighth Circuit concluded that the County had failed to present a question arising under federal law for purposes of federal court jurisdiction under 28 U.S.C. 1331. See 668 F.2d at 30-32. That disposition was, of course, without prejudice to the substantiality of the federal claim; the sole basis of the ruling was a finding that the federal issue arose only as a defense to a state law claim for funds that had not yet been made. Cf. *Public Service Comm'n* v. *Wycoff Co.*, 344 U.S. 237, 248-249 (1952).

In the proceedings now before the Court, the appellants raised their claim of unconstitutionality under the Supremacy Clause as a defense to a state court mandamus action in which appellee sought to require the County to pay to it a given percentage of the federal in lieu of taxes payments. The South Dakota Supreme Court upheld the South Dakota statute in the face of appellants' claim that it is invalid because repugnant to a federal statute, thus bringing the case within the Court's appellate jurisdiction under 28 U.S.C. 1257(2).

how to apply them, as long as the funds are used for a governmental purpose.[7]

The federal statute also makes it clear that payments are to be made directly to general government units, not to special purpose units such as school districts; indeed, appellee admits as much (Mot. to Aff. 2). Under 31 U.S.C. 6901(2), a "unit of general local government" is defined as a "general purpose political subdivision of a State." Thus, it is general purpose units, such as appellant Lawrence County, that are entitled to receive the federal funds and to decide how they will be spent. While a county may choose to allocate some of the funds to school districts, it need not do so. In explaining the Payments in Lieu of Taxes Act, the court in *Altus-Denning School District No. 31* v. *Franklin County,* 568 F.Supp. 95, 101 (W.D. Ark. 1983), correctly noted (emphasis in original):

> [E]ven though Congress no doubt intended for some of the in lieu of tax funds to go to school districts, believing that the counties would disburse these funds with prudence, equity, and an eye to the obvious needs of the school districts, Congress nonetheless expressly allowed

[7]The South Dakota Supreme Court concluded that the language of the federal statute signifies only a requirement that funds be used for some governmental purpose and includes no restriction on payment of funds to school districts. The court therefore construed the federal statute as not precluding a state requirement that local governments pay the federal funds to school districts. But this construction of the statute fails to give meaning to the words "may use" in 31 U.S.C. 6902(a) ("may be used" under 31 U.S.C. 1601), which appear to indicate that the local governments will have discretion to choose the governmental purposes for which they will use the funds.

The word "may" could be read as merely permitting or authorizing use by a local government of federal funds for any governmental purpose, not as precluding imposition of restrictions on such use. See H.R. Rep. 97-651, *supra,* at 2. But the legislative history, discussed below, indicates that Congress had a broader meaning in mind.

> whichever unit constitutes the "unit of local government" of [31 U.S.C. 6901] to expend these funds for *any* governmental purpose.

See also *Kendall* v. *Towns County,* 146 Ga. App. 760, 762, 247 S.E.2d 577, 579 (1978).[8]

b. The legislative history of the Payments in Lieu of Taxes Act confirms our reading of the statute. The South Dakota Supreme Court found it unnecessary to examine that legislative history because it viewed the language of the statute as "plain, clear and rational" (J.S. App. 3a). As we have shown, the court below appears to have misread the statutory language. But in any event, the court clearly erred in disregarding the legislative history and underlying purpose of the statute. See *Dickerson* v. *New Banner Institute, Inc.,* No. 81-1180 (Feb. 23, 1983), slip op. 15-16; *Train* v. *Colorado Public Interest Research Group, Inc.,* 426 U.S. 1, 9-11 (1976).

The legislative history reveals that Congress intended not only that local governments receive increased levels of funding under the Payments in Lieu of Taxes Act, but also that they have discretion in allocating those funds. Both congressional committees that considered the legislation stated

[8]Consideration of another provision of the federal statute, 31 U.S.C. 6904(b), provides additional support for this interpretation. Section 6904(b) provides expressly that in the case of certain additional short-term federal payments in connection with acquisition of park or wilderness areas, the Secretary "shall distribute payments proportionally to units and school districts that lost real property taxes because of the acquisition of the interest." Thus, Congress knew how to express an intention that funds be earmarked for school districts. The express directive in Section 6904(b) reinforces the conclusion that Congress did not wish funds authorized under 31 U.S.C. 6902(a) to be earmarked for school districts, but rather intended for local governments themselves to have the discretion to allocate such funds. See *Fedorenko* v. *United States,* 449 U.S. 490, 512 (1981).

unequivocally that "payments under [the Payments in Lieu of Taxes Act] should go directly to units of local government since the local governments are the entities which assume the burden for the tax immunity of these lands. The Committee does not believe these new payments should be restricted or earmarked for use for specific purposes and the bill allows these payments to be used for any governmental purpose." S. Rep. 94-1262, *supra*, at 15; H.R. Rep. 94-1106, 94th Cong., 2d Sess. 12 (1976). See also 122 Cong. Rec. 25742 (1976) (remarks of Rep. Quillen) ("the local governments are given the discretion to use these moneys as they determine").

In providing that local governments were to be the recipients of the payments under the new statute, Congress expressly rejected as unsatisfactory the scheme of many of the existing impact aid programs under which states (rather than local governments) received funds and decided how they would be distributed. S. Rep. 94-1262, *supra*, at 15. The Senate committee noted that it is local governments that bear the burden of providing a wide variety of services related to the presence of land within their boundaries (*id.* at 8-9):

> These lands attract thousands of visitors each year, yet the intangible economic benefits to the local economy from tourist related activities in and adjacent to these lands do not usually accrue to the local taxing authority. Income and sales taxes are sources of funds for the State treasury, yet the local governments are the entities which must provide for law enforcement, road maintenance, hospitals, and other services directly and indirectly related to the activities on these lands.

Congress also expressed dissatisfaction with the earmarking of funds that had resulted either from federal statutory requirements or the fact that states controlled the distribution of funds under some programs. The Senate

committee noted that use of funds under existing programs was often restricted to construction and maintenance of roads and schools (S. Rep. 94-1262, *supra*, at 9), but that the range of local government needs was in fact much greater:

> [L]ocal governments are called upon to provide many other services to the Federal lands or as a direct or indirect result of activities on the Federal lands. These services include law enforcement; search, rescue and emergency; public health; sewage disposal; library; hospital; recreation; and other general local government services. It is only the most fortunate of local governments which is able to juggle its budget to make use of those earmarked funds in a manner which will accurately correspond to its community's service and facility needs.

Ibid. Thus, it was an important purpose of the new statute to give local governments control over federal funds and the freedom to allocate them in a manner that would allow satisfaction of the wide range of needs for governmental services that arise from the presence of federal lands.[9]

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[9]A subsequent amendment to the Payments in Lieu of Taxes Act sheds further light on Congress's intent in enacting the original statute. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-381 (1969). In 1983, Congress amended the Act to authorize states to make limited redistributions of payments among units of general purpose local government within the same county. Pub. L. No. 98-63, § 3(4), 97 Stat. 324 (to be codified at 31 U.S.C. 6907). See J.S. App. 36a. The 1983 amendment was passed in response to *Meade Township* v. *Andrus*, 695 F.2d 1006 (1982), in which the Sixth Circuit held that the Secretary of the Interior had exceeded his authority under the Payments in Lieu of Taxes Act in refusing to provide for payments to townships as well as counties in Michigan. See 129 Cong. Rec. S 8444 (daily ed. June 15, 1983). The fact that Congress found it necessary to provide expressly that a state may reallocate funds in a certain manner lends additional weight to the conclusion that, in the absence of such a provision, states may not dictate the distribution of in lieu of taxes payments.

c. The Department of the Interior — the agency charged with administration of the Payments in Lieu of Taxes Act — has consistently interpreted that statute as requiring that federal payments be made to general purpose local government units and that those units retain the discretion to use the funds for any governmental purpose. The Department promulgated 43 C.F.R. Subpart 1881 in 1977, soon after passage of the Act. 43 C.F.R. 1881.0-5(b)(2) makes clear that school districts may not receive funds directly.[10] 43 C.F.R. 1881.2 states that payments made to local governments (with the exception of the additional payments authorized by 31 U.S.C. 6904(b)) may be used for "any governmental purpose." The Department's interpretation of the Act as foreclosing either direct payments to school districts or limitations on use of the funds is entitled to deference. See, *e.g., Blum* v. *Bacon,* 457 U.S. 132, 141 (1982); *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31-32 (1981); *Zenith Radio Corp.* v. *United States,* 437 U.S. 443, 450-451 (1978); *Udall* v. *Tallman,* 380 U.S. 1, 16 (1965).[11]

d. It is no answer that, in this instance, the State law —with superficial appropriateness — merely directs the recipient counties to allocate the federal monies "in the same manner as taxes are distributed," rather than according to a formula directly prescribed by the State. South Dakota law appears to require counties to set a levy on taxable property at a rate sufficient to meet the school

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[10]43 C.F.R. 1881.0-5(b)(2) provides:

> The term "unit of general government" excludes single purpose or special purpose units of local government such as school districts or water districts.

[11]Two courts have found the Secretary's regulations to be consistent with the federal statute in this respect. See *Altus-Denning School District No. 31* v. *Franklin County,* 568 F. Supp. at 101; *Kendall* v. *Towns County,* 146 Ga. App. at 762, 247 S.E.2d at 579.

budget. S.D. Codified Laws §§ 10-12-29, 13-11-3 (rev. 1982). Thus, a county apparently may not reduce a school district's share of taxes in anticipation that federal in lieu of taxes payments would meet any shortfall. Even if counties were free to expend or allocate locally raised taxes as they wished, it is doubtful that they would be able to adjust their tax distribution plans in such a way as to prevent any increment to school districts by virtue of the federal payments. County revenues, including other federal impact program funds, some of them specially earmarked, vary from year to year. Moreover, the State presumably retains power to control local budgets and might well intervene if a county were seen to be evading the intent of the State directive.

At all events, the counties receiving in lieu of taxes payments from the United States ought not be pushed into complex schemes to circumvent State intrusion. The purpose of these federal payments is to give local governments a minimum amount of federal money to use at their discretion to fill in gaps, to reduce fiscal and budgetary swings, and to allow more effective planning. This can be accomplished only through local control and decisionmaking.

It is thus clear that S.D. Codified Laws § 5-11-6 (rev. 1980) conflicts directly with the Payments in Lieu of Taxes Act. The South Dakota statute requires localities to expend the federal in lieu of taxes payments in a particular manner; that is inconsistent with the language and legislative purpose of the federal statute, under which local governments are to have discretion in apportioning the payments. The federal statute, read in the light of the underlying congressional purpose, leaves no room for such state interference with local discretion. Cf. *Chicago & N.W. Transportation Co.* v. *Kalo Brick & Tile Co.,* 450 U.S. at 318; *Hisquierdo* v. *Hisquierdo,* 439 U.S. 572, 583-585 (1979). Therefore, to

the extent the South Dakota statute purports to affect the distribution of federal in lieu of taxes payments, it is invalid under the Supremacy Clause.[12]

2. This case is of considerable practical importance. If the decision of the South Dakota Supreme Court is allowed to stand, South Dakota counties will be required to allocate federal in lieu of taxes payments in a manner they probably would not otherwise choose. As a result, certain local programs will not receive the full amount of financial support the local government regards as proper. As a result, the scope of such programs will be curtailed, perhaps reducing the level of essential services the local governments are able to offer in connection with federal lands.

Moreover, if not reversed by this Court, the decision below may encourage other states to enact legislation similar to the South Dakota statute — or even more intrusive. In the past other states have enacted statutes that interfere with (or have the potential to interfere with) the distribution of federal payments under various in lieu of taxes programs. See *Altus-Denning School District No. 31* v. *Franklin County, supra; Hergenreter* v. *Hayden,* 295 F. Supp. 251 (D. Kan. 1968); *Shepheard* v. *Godwin,* 280 F. Supp. 869

[12]This conclusion is consistent with *Altus-Denning School District No. 31* v. *Franklin County, supra,* in which the district court rejected the contention that Ark. Stat. Ann. § 80-726 (repl. 1980) required that counties share federal in lieu of taxes payments with school districts. The Arkansas statute required county treasurers to apportion to school districts any funds received from income from national forests. The district court concluded that, assuming arguendo that the Arkansas statute applied to funds under the Payments in Lieu of Taxes Act, the state statute would be invalid under the Supremacy Clause because it would conflict with the "any governmental purpose" language in the federal statute. 568 F. Supp. at 102.

(E.D. Va. 1968).[13] Thus far, such statutes have been held invalid or inapplicable to federal in lieu of taxes payments. However, if the South Dakota statute survives judicial review, other states (many of which are facing budgetary difficulties) can be expected to use it as a model in their efforts to gain greater control of available revenues. The result will be to undermine further the congressional purpose underlying the Payments in Lieu of Taxes Act.

CONCLUSION

Probable jurisdiction should be noted. The Court may wish to consider summary reversal.

Respectfully submitted.

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[13]The Kansas and Virginia statutes at issue in the *Hergenreter* and *Shepheard* cases required deduction from a school district's share of state educational funding of certain federal payments made to school districts impacted by federal land and federal employees. In both cases, three-judge courts held the statutes invalid on the ground that they conflicted with the purpose of the federal program, which was to supplement local revenues, not to replace them.